

## **EXHIBIT 2**

COPY

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS

3 -----X  
4 DANIEL A. FERRIE,

5 Plaintiff,

6 vs.

7 K MART CORPORATION,

8 Defendant.  
9 -----X

10  
11 DEPOSITION OF JON SWANK

12 New York, New York

13 Friday, June 24, 2005  
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23 ELLEN GRAUER COURT REPORTING, CO., LLC  
24 133 East 58th Street, Suite 1201  
25 New York, New York 10022  
212-750-6434  
REF: 77920

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June 24, 2005

11:10 a.m.

Deposition of JON SWANK, held at  
the offices of Foley & Lardner, 90 Park  
Avenue, New York, New York, pursuant to  
Order, before William Byrne, a Notary  
Public of the State of New York.

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A P P E A R A N C E S:

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Attorney for Plaintiff

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BY: JEFFREY M. ROSIN, ESQ.

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J O N            S W A N K,

having been first duly sworn by a  
Notary Public, was examined and  
testified as follows:

MR. ROSIN:    We reserve all  
objections as to the form of the  
question and attorney-client privilege  
to the end.

MR. WOOD:    And motions to  
strike, and we waive a notary which the  
witness has to read and sign the  
transcript before within 30 days.

MR. ROSIN:    That's fine.

EXAMINATION BY

MR. WOOD:

Q.            Good morning, sir.

A.            Good morning.

Q.            What is your address, sir?

A.            1803 Gary Road, Stewartville,  
New Jersey.

Q.            How long have you lived there?

A.            Approximately a year and-a-half.

Q.            Do you live there with anybody?

A.            My wife and two children and two

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2 or parking lot or mall that K Mart was in and  
3 I do believe it would be one of the first  
4 times that a K Mart would be going head to  
5 head with Wal-Mart right in the same parking  
6 lot. My regional vice president was looking  
7 for a capable manager to run the Fall River  
8 location effectively to go head to head with  
9 Wal-Mart.

10 Q. Who decided to transfer Mr.  
11 Ferrie to the Fall River store?

12 A. I would have to guess that would  
13 have been my regional vice president.

14 Q. Did you have any input in the  
15 decision?

16 A. The only input I would have had  
17 would have been my recommendation as to  
18 whether he was fully capable to do that.

19 Q. Do you recall what your  
20 recommendation was?

21 A. I do not recall specifically  
22 what my recommendation was; I would or I could  
23 tell you I would recommend him for that. He  
24 did a very good job in Somerville.

25 Q. Would he have been transferred



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2 to Fall River without your recommendation, to  
3 the best of your knowledge?

4 A. To the best of my knowledge he  
5 could have been, I would only have to  
6 speculate here, I couldn't really answer that.

7 Q. To the best of your recollection  
8 how long was Mr. Ferrie employed by K Mart as  
9 store manager of the Fall River store?

10 A. Can I review my time lines  
11 again?

12 Q. Sure.

13 A. My best estimate would be that  
14 he probably ran the Fall River location for  
15 maybe six to nine months, the Fall River  
16 location was not my responsibility.

17 Q. Although it was not your  
18 responsibility, do you have any knowledge as  
19 to Mr. Ferrie's performance as store manager  
20 of the Fall River store?

21 A. No.

22 Q. To the best of your recollection  
23 where did Mr. Ferrie go next?

24 A. He came to run the Braintree,  
25 Massachusetts K Mart.

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2 Q. To the best of your  
3 recollection, that was immediately subsequent  
4 to Fall River?

5 A. Yes.

6 Q. To the best of your  
7 recollection, why was Mr. Ferrie transferred  
8 to the Braintree store?

9 A. Mr. Ferrie, if I can recall, had  
10 contacted me and expressed his want to run the  
11 Braintree store, he knew it was an open  
12 position and the Braintree location was a  
13 large newer building with a much higher volume  
14 than Fall River; if I recall, he had expressed  
15 to me at that time his I think he had  
16 generally gotten bored in Fall River.  
17 Wal-Mart had opened, it had taken the volume  
18 of Fall River very far down and he had wanted  
19 to take on the challenge of the Braintree  
20 location. He, of course, when he had  
21 previously worked for me previously had done a  
22 good job, so I spoke to my regional vice  
23 president about it and the decision was made  
24 to place him as store manager.

25 Q. Who was the regional vice



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2 A. I believe Dave Bennett was  
3 placed into that position.

4 Q. Do you know a Charles or Chuck  
5 James?

6 A. Yes.

7 Q. Is it possible that Mr. James  
8 was placed in that position?

9 A. It is possible the position that  
10 Dave Bennett filled, may have been earlier  
11 than what we are referencing here. It is  
12 possible that Chuck James filled that position  
13 because that name has sparked my memory that  
14 he did run the southern Mass district prior to  
15 going to Connecticut.

16 Q. Why don't we focus on Mr. James  
17 for a moment.

18 A. Yes.

19 Q. Do you recall Mr. James's age  
20 just approximately?

21 A. I would think that he was  
22 possibly in his early 30s.

23 Q. And this would be in his early  
24 30s at the time of his promotion to district  
25 manager?

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Hampshire market?

A. Yes, I recall that there was a new district manager placed in New Hampshire.

Q. Do you recall who that individual was?

A. I believe that individual was a gentleman by the name of Dan Nicolenni.

Q. Where had Mr. Nicolenni worked previously?

A. Dan Nicolenni had worked in higher volume stores on Long Island and he also ran the Saugus, Mass location.

Q. Mr. Nicolenni was store manager of Saugus, Massachusetts?

A. Yes.

Q. And you mentioned the higher volume locations where he worked, what position did he hold at those locations?

A. To the best of my knowledge he was the operations manager.

Q. Do you recall Mr. Nicolenni's approximate age at the time he was promoted to district manager?

A. Once again I would have to

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2 guess, and I would assume he was in his  
3 mid-30s.

4 Q. Getting back to Mr. Ferrie's  
5 transfer to the Braintree location. At the  
6 time of Mr. Ferrie's transfer to Braintree,  
7 was the Braintree store considered a broken  
8 store?

9 A. Yes, it was.

10 Q. And how do you define the term  
11 "broken store"?

12 A. Broken store is once again a  
13 very broad statement. The presentation was  
14 unacceptable. The in-stock assortments were  
15 unacceptable, the store morale was  
16 unacceptable to our corporate standards.

17 Q. How was Mr. Ferrie's performance  
18 as store manager of the Braintree store?

19 A. He did a good job.

20 Q. Was he able to turn around the  
21 Braintree store from being a broken store?

22 A. We definitely were able to get  
23 the store off the broken list, yes. When I  
24 refer to the broken list it's what I mean as  
25 something that we would refer to to our

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Q. Do you recall at any time that Mr. Ferrie was store manager of the Braintree store, complaints concerning Mr. Ferrie brought by any member of his staff?

A. I do not recall specifically.

Q. Do you recall anything generally?

A. I do not recall.

Q. Do you recall an individual by the name of Michael Hedlund?

A. Yes, I do.

Q. And who was Mr. Hedlund?

A. He was the front end manager of the location.

Q. Of the Braintree store?

A. Yes.

Q. Briefly what were or what are the duties of a front end manager?

A. Basically he or she oversees the operations of the front of the checkouts in our stores, overseeing the operational running of the checkouts.

Q. Do you recall any communications between you and Mr. Ferrie concerning Mr.



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Hedlund?

A. I don't recall specific communications.

Q. Do you recall any performance issues concerning Mr. Hedlund?

A. I recall he would frequently be unhappy with the performance of the front end in Braintree, and Michael's reaction to that performance?

Q. And when you say and Michael's reaction to that performance, what do you mean by that, sir?

A. Specifically, I would recall my observations that Mike Hedlund would not respond to lines at the front checkouts effectively enough.

Q. Do you recall any other performance issues concerning Mr. Hedlund?

A. Not specifically, no.

Q. Did you ever instruct Mr. Ferrie to discipline Mr. Hedlund, to the best of your recollection?

A. No, not to the best of my recollection, no.



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2 Q. Did you ever instruct Mr. Ferrie  
3 to terminate Mr. Hedlund?

4 A. No.

5 Q. Did you have an opinion as to  
6 the quality of Mr. Hedlund's job performance?

7 A. Yes.

8 Q. What was that opinion, sir?

9 A. I felt he was a lower performer.

10 Q. Can you be more specific?

11 A. Out of the group of my stores as  
12 far as front end manager, I felt he was one of  
13 the least effective front end managers.

14 Q. At any point when Mr. Ferrie was  
15 store manager of the Braintree store, did you  
16 discuss with Mr. Ferrie the possibility of him  
17 being promoted to a district manager position?

18 A. Not that I specifically recall.

19 Q. Do you recall a district manager  
20 position becoming open during Mr. Ferrie's  
21 tenure as store manager of the Braintree  
22 store?

23 A. I do not specifically recall.

24 Q. Do you recall a meeting with Mr.  
25 Ferrie in a restaurant in Braintree concerning

1 SWANK

2 a promotion to the position of district  
3 manager?

4 A. No, I do not.

5 Q. Specifically at a restaurant  
6 called Tennessee Pork, does that help to  
7 refresh your recollection?

8 A. No, it does not.

9 Q. At any time during Mr. Ferrie's  
10 tenure as store manager of the Braintree  
11 location, did you communicate with anyone else  
12 concerning the possibility of promoting Mr.  
13 Ferrie to district manager?

14 A. Not that I recall.

15 Q. Do you recall, again, during the  
16 same period David Bennett being promoted to  
17 the position of district manager?

18 A. I know that Dave Bennett was  
19 hired and placed into a position of a district  
20 manager.

21 Q. Could this have been during the  
22 period when Mr. Ferrie was employed as store  
23 manager at Braintree?

24 MR. ROSIN: Objection.

25 A. I do not recall specifically the

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Q. Do you have any knowledge as to how long Mr. Bennett was store manager of that store?

A. I have no knowledge.

Q. At the time of his promotion to district manager, do you know Mr. Bennett's approximate age?

A. No.

Q. Was he over 30?

MR. ROSIN: Objection. To the best of your knowledge.

A. You are asking me to guess, would you like me to guess?

Q. Was he over 60?

MR. ROSIN: Objection.

Q. You can answer.

A. I do not believe he was over 60.

Q. Was he over 40?

MR. ROSIN: Objection.

A. I'm trying to get your best recollection of Mr. Bennett's age, sir.

A. I would not estimate him to be over 40.

Q. Thank you.

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2 Q. Did you ever recommend Mr.  
3 Ferrie for promotion to the position of  
4 district manager?

5 A. No.

6 Q. Why not?

7 A. It was not my position to  
8 promote district managers and my regional vice  
9 president never inquired of me a  
10 recommendation.

11 Q. Is it your testimony that it  
12 would not be part of your job duties to  
13 recommend store managers for promotion to  
14 district manager?

15 A. I cannot specifically state that  
16 it is within my job description to identify  
17 district manager candidates.

18 Q. And it's your understanding that  
19 that's not part of the succession planning  
20 process?

21 A. Can I take a break to think  
22 about this?

23 Q. Do your best to answer now and  
24 then you can take a break.

25 MR. ROSIN: Read back to



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2 concerning the soft lines clearance bulk  
3 sales, if anything?

4 A. I recall that in the course of  
5 this investigation, I don't remember  
6 specifically how, but that my specific  
7 instructions of the soft lines to go through  
8 the checkouts and being scanned for each item  
9 individually so the mark-downs were properly  
10 recorded was not followed.

11 Q. Anything else that you recall?

12 A. Not that I recall.

13 Q. Do you recall Mr. Ferrie having  
14 a workplace injury while employed in the  
15 Braintree store?

16 A. Yes.

17 Q. What do you recall of that, sir?

18 A. I recall that he slipped and  
19 fell. And I do believe it was up at our  
20 service desk and he was out for the duration  
21 of my tenure as district manager there. He  
22 was not present for this investigation.

23 Q. To the best of your knowledge  
24 was an investigation conducted concerning Mr.  
25 Ferrie's injury?



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2 MR. ROSIN: Objection.

3 Q. You can answer the question.

4 A. To the best of my knowledge the  
5 loss prevention district manager conducted an  
6 investigation into -- the standard workplace  
7 investigation into an injury.

8 Q. Did you have any involvement in  
9 that investigation?

10 A. No, I did not.

11 Q. Did anyone speak to you  
12 concerning Mr. Ferrie's injury as part of that  
13 investigation?

14 A. I had or I recall a conversation  
15 with one of the area managers just confirming  
16 or not confirming just speaking about his  
17 fall.

18 Q. Anything else that you recall  
19 concerning Mr. Ferrie's injury?

20 A. No.

21 Q. Do you recall speaking to anyone  
22 concerning Mr. Ferrie's injury?

23 A. I would -- we had a store  
24 manager now out on Workmen's Comp, and I would  
25 speak with my regional manager in regards to

1 SWANK

2 the situation and I would speak with my loss  
3 prevention district manager. I can't recall a  
4 specific conversation though.

5 MR. WOOD: Off the record.

6 (Discussion off the record.)

7 Q. Regarding the alleged smart plan  
8 manipulation; do you recall an issue regarding  
9 a stolen credit card concerning this smart  
10 plan manipulation issue?

11 A. Yes, it was related to me by  
12 Donna Mastroeni in the course of the internal  
13 audit investigation.

14 Q. And what do you recall or how do  
15 you recall a stolen credit card played a role  
16 in this smart plan manipulation issue?

17 A. As it was related to me, a  
18 credit card -- an individual came in and made  
19 a major purchase on a K Mart cash card in the  
20 Braintree location. It was flagged by our  
21 loss prevention manager. A major purchase on  
22 a cash card would be something that the loss  
23 prevention manager would flag. He traced the  
24 purchase of the cash card to be purchased at a  
25 store in New Hampshire -- once again are you